No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by His Guardian ad Litem, Chow Yit Quong,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

The appellant herein claims to be the son of Chow Yit Quong, alleged to be a citizen of the United States at the time of his birth in China. Paragraphs II, III, and IV of the petition allege:

> "II. That the said plaintiff is the true and lawful blood son of Chow Yit Quong, a citizen of the United States; that as evidence of his United States citizenship, Chow Yit Quong holds Certificate of Identity No. 47426 issued September 12, 1923, by the Immigration Service at San Francisco, California;

"III. That the said plaintiff arrived at the Port of San Francisco, State of California, ex SS 'President Wilson' on August 23, 1950, seeking admission as a citizen of the United States, such citizenship having been acquired under the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934 and Section 201(g) of the Nationality Act of 1940 (8 U.S.C.A. 601(g));

"IV. That the defendant is the duly appointed and acting Attorney General of the United States; that the plaintiff applied to the Immigration and Naturalization Service at San Francisco, State of California, an official executive of the defendant herein, for recognition and admission to the United States as a citizen thereof; that the said Immigration and Naturalization Service at San Francisco, State of California, did on or about the 19th day of October, 1950, deny this plaintiff's application for admission and recognition as a United States citizen; that the Commissioner, Immigration and Naturalization Service, and the Board of Immigration Appeals, both of Washington, D. C., have affirmed said excluding decision; and that such plaintiff has exhausted his administrative remedies."

The answer denies the claimed relationship to Chow Yit Quong and denies that appellant is a United States citizen.

After appellant's arrival at the port of San Francisco he was afforded an administrative hearing, during which he was represented by counsel. His request

for admission into the United States was denied, and after filing an action under 8 U.S.C. 903, trial was had. Following the trial, the Court below found as fact, "It is not true that the permanent residence and domicile of the person who claims to be plaintiff Chow Sing is within the Northern District of California or in the United States of America." The Court also found that the appellant "has failed to introduce evidence of sufficient clarity to satisfy or convince this court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing."

From the judgment denying the relief sought the above appeal was taken.

INTRODUCTORY STATEMENT.

On January 12, 1953 Judge Louis E. Goodman ordered judgment for defendant in the case of *Ly Shew v. Acheson,* 110 Fed. Supp. 50, and on the same day ordered judgment for the defendants in *Fong Wone Jing, et al. v. Dulles,* No. 13745 (9th Cir.), and the above case, *Chow Sing v. Brownell,* No. 13746 (9th Cir.). An appeal has been taken in each case. Appellants claim United States citizenship under the provisions of Section 1993, Revised Statutes, as amended (derivative), as alleged children of a United States citizen father. None of the appellants had previously resided in the United States.

In the *Fong Wone Jing* case, the appellants had made application to the American Consul at Hong Kong for documentation *"to proceed to a port of entry in the United States for the purpose of having their admissibility determined by the administrative agency charged with such duty,"* and in the *Ly Shew* case, appellants had made application to the American Consul at Hong Kong "for permission to enter the United States as a citizen thereof and/or *for the purpose of having his claim to citizenship passed upon and adjudicated by the Immigration and Naturalization Service of the United States".* The consul refused to issue the requested documentation in *Fong Wone Jing* and *Ly Shew,* whereupon suit was instituted under 8 U.S.C. 903 against the Secretary of State.

The application for documentation made to the American Consul at Hong Kong by Chow Sing, appellant herein, was granted, and travel authority in the form of a "Travel Affidavit" was approved. Said affidavit, No. 1427, although not part of the record on appeal, was signed by appellant, who stated in paragraph 8 of the affidavit:

> "I execute this affidavit to serve as a travel document in order to facilitate my/our emigration to America, with the understanding that my/our eligibility to enter the United States will be determined by the Immigration and Naturalization Service upon my/our arrival at a port of entry."

Appellant arrived at the port of San Francisco on August 23, 1950. A Board of Special Inquiry was convened and an administrative hearing was accorded appellant. During the course of the hearing he was at all times represented by counsel. Upon conclusion of the hearing appellant was denied admission to the United States on the ground that he was an *alien immigrant* not in possession of an immigration visa which would enable him to enter the United States for permanent residence. An appeal to the Board of Immigration Appeals was dismissed. A complaint under 8 U.S.C. 903 was thereafter filed in the District Court naming the Attorney General of the United States as defendant.

The claims to citizenship by the appellants in *Fong Wone Jing, Ly Shew* and *Chow Sing* herein are similarly founded. It is our intention to incorporate by reference those portions of the *Fong Wone Jing* and *Ly Shew* briefs which we consider pertinent.

STATUTES.

Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, Title 8 U.S.C. 903.

Sec. 1993, Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797, Title 8 U.S.C. 6.

"§903. Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his

decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, § 503, 54 Stat. 1171."

Sec. 1993, Revised Statutes.

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Act May 24, 1934—48 Stat. 797.

"Citizenship of Children Born Abroad of Citizen Fathers (Acts of April 14, 1802, and February 10, 1855, as amended by Act of May 24, 1934).

"Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday,

and unless, within six months after the child's twenty-first brithday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization. (Sec. 1, Act of May 24, 1934, 48 Stat. 797; 8 U.S.C. 6.)"

QUESTIONS PRESENTED.

Appellant asserts (Tr. p. 6) the sole issue is whether appellant is the son of a recognized United States citizen. Although there are five specifications of error, the question is stated singly as whether the lower Court's findings are "clearly erroneous." Specifications 1, 2, 3, and 5 are embodied within the single question.

Specification 4 cites error in finding that plaintiff-appellant did not have a claim to permanent residence within the Northern District of California or in the United States of America.

Does the Court have jurisdiction of the appellant's claim under 8 U.S.C. 903?

A. Appellant had not resided in the United States prior to making his claim;

B. There was no denial of a "right or privilege" within the meaning of Section 903;

C. The only judicial remedy available to appellant is habeas corpus.

ARGUMENT.

I. JURISDICTION.

Although appellant herein did specify as error in the District Court the finding that appellant did not have a claim to residence, the question of jurisdiction has been completely ignored. Quoting from the opinion of Judge Goodman in *Ly Shew v. Acheson,*

> "It has been blithely assumed that plaintiffs, who have never been in the United States and who have lived their lives as Chinese, have the status and right to avail themselves of Section 903."

A. Appellant had no residence in the United States upon which to found a claim of "permanent residence" in that he had never previously been in the United States.

Pages 8 to 38 of appellee's brief in *Fong Wone Jing* and pages 5 to 16 of appellee's brief in *Ly Shew* filed in this Court as related to the availability of Section 903 to persons who have never been in the United States are incorporated herein and made a part of this brief.

B. There was no denial of a right or privilege within the meaning of Section 903.

The exclusion of appellant by Immigration is not a denial of right or privilege of a national on the ground that he is not a national, but a determination that the individual is an alien.

Reference is again made to appellee's briefs in the *Fong Wone Jing* and *Ly Shew* cases which have been incorporated herein.

Since the filing of the aforesaid briefs Judge Westover has filed a memorandum opinion in four cases in the Southern District which will probably be appealed to this Court, *Wong Wing Sloo v. Dulles,* No. 14,742-HW; *Wong Fay Poo, etc. v. Dulles,* No. 14,761-HW; *Wong Doon Loy v. Dulles,* No. 14,864-HW, and *Chin Kwong Hing v. Dulles,* No. 14,980-HW. The four cases were set for a pre-trial hearing upon the sole issues of jurisdiction. The "certified passport files" were presented to the Court by the United States Attorney and offered in evidence. Over the objection of plaintiffs, the Court admitted them for the limited purpose of ascertaining whether plaintiffs and/or either of them "have been denied any right or privilege as nationals of the United States on the ground that they were not such nationals." The four cases were dismissed for want of jurisdiction; *Wong Doon Loy* for failure to establish right to passport privilege under requirements; *Chin Kwong Hing* in that the denial was on the ground that the claim of parentage was fraudulent; *Wong Fay Poo* in that the denial was on the ground that he failed to verify the facts alleged in his application. *Wong Wing Sloo* in that the denial was on the ground that he failed to establish the identity alleged. The opinion is made a part hereof as Appendix A.

C. Appellant's sole remedy is by way of habeas corpus.

Justice Holmes in *United States v. Sing Tuck* (1904), 194 U.S. 161, held:

"We are of the opinion, however, that the words quoted ('in every case where an *alien* is excluded * * * the decision of the appropriate immigration or customs officers * * * shall be final, unless reversed on appeal * * *') *apply to a decision on the question of citizenship* * * *" (Emphasis and words in parentheses ours.)

In *Quon Quon Poy v. Johnson,* 273 U.S. 352, Mr. Justice Sanford stated at page 358:

"It is clear, however, in the light of the previous decisions of this court, that when the petitioner, *who had never resided in the United States, presented himself at its border for admission, the mere fact that he claimed to be a citizen did not entitle him under the Constitution to a judicial hearing.*" (Emphasis ours.)

The Courts through the years have been consistent in holding that the only judicial review of immigration proceedings is by way of habeas corpus.

Citizenship claims:

U. S. v. Jung Ah Lung, 124 U.S. 621;
Chin Yow v. U. S., 208 U.S. 8;
Kwock Jan Fat v. White, 253 U.S. 454;
Ng Fung Ho v. White, 259 U.S. 276.

Aliens:

Bilokumsky v. Tod, 263 U.S. 149;
Tisi v. Tod, 264 U.S. 131;
Vajtauer v. Comm. Imm., 273 U.S. 103, 106;
Bridges v. Wixon, 326 U.S. 135, 167;
Heikkila v. Barber, 345 U.S. 229.

The case of *Heikkila v. Barber,* supra, involved the question of the judicial remedy available to an *alien* whom Immigration sought to deport (expulsion). Heikkila contended that since the Administrative Procedure Act the Courts could review deportation orders by way of declaratory judgment or review of agency action. The government maintained that the only remedy available was habeas corpus. The Supreme Court in interpreting the "finality" of the Attorney General's decisions reviewed the history of immigration legislation, both in the statutes and in the decisions of the Supreme Court. At page 4 the Supreme Court said:

> "It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1086, which provided in part that 'All decisions made by the inspection officers or their assistants touching the *right of any alien to land,* when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.' The appellant in *Ekiu v. United States,* 142 U.S. 651 (1892) argued that if § 8 was interpreted as making the administrative exclusion decision conclusive, she was deprived of a constitutional right to have the courts on habeas corpus determine the legality of her detention and, incidental thereto, examine the facts on which it was based. Relying on the peculiarly political nature of the legislative power over aliens, the Court was clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers. Cf. *Harisiades v. Shaughnessy,* 342 U.S. 580

(1952). Mr. Justice Gray found that § 8 was 'manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the *Act.*' 142 U.S., at 664. With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, e.g., § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. *During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution.* Fong Yue Ting v. United States, 149 U.S. 698 (1893). In *Lem Moon Sing v. United States,* 158 U.S. 538 (1895), *treating a comparable provision for the enforcement of the Chinese Exclusion Act, Mr. Justice Harlan observed that when Congress made the administrative decision final, 'the authority of the courts to review the decision of the executive officers was taken away.'* Ibid, at 549. And by 1901, Chief Justice Fuller was able to describe as *'for many years the recognized and declared policy of the country'* the congressional decision to place *'the final determination of the right to admission in executive officers, without judicial intervention.'* Fok Young Yo v. United States, 185 U.S. 296, 305 (1902). See also the Japanese Immigrant case (Yamataya v. Fisher), 189 U.S. 86 (1903); Pearson v. Williams, 202 U.S. 281 (1906); Zakonaite v. Wolfe, 226 U. S. 272 (1912).

> "Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 890 clearly had the effect of precluding judicial intervention in deportation cases except in so far as it was required by the Constitution.[9] And the decisions have continued to regard this point as settled. Kessler v. Strecker, 307 U.S. 22, 34 (1939); Bridges v. Wixon, 326 U.S. 135, 149, 166, 167 (1945); Estep v. United States, 327 U.S. 114, 122, 123, n. 14 (1946); Sunal v. Large, 332 U.S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the *Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine.*" (Italics ours.)

In the case at bar, appellant was found by Immigration to be an alien. His admission into the United States was denied for lack of possession of proper documents. The authority of Immigration Service to so find was established by the Supreme Court in *Sing Tuck* and *Quon Quon Poy.* See also *Florentine v. Landon,* 206 F.2d 870 (9th Cir. Aug. 27, 1953). As an alien, appellant is entitled *only* to habeas corpus.

---

[9] "The Senate Committee said, 'The last (finality) provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, *as well as in the cases of those excluded at our ports,* the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (The Japanese Immigrant Case, 189 U.S. 86; Pearson v. Williams, 202 U.S. 281).' S. Rep. No. 352, 64th Cong., 1st Sess., Vol. 2, 16.

II. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT ARE CORRECT.

At page 6 of his brief appellant concludes that the sole issue in the proceeding is whether appellant is the son of a recognized United States citizen and cites the cases of *Gung You v. Nagle,* 34 F.2d 848, 851 (9th Cir.), *Quan Toon Jung v. Bonham,* 119 F.2d 915, 916 (9th Cir.), and *Yep Suey Ning v. Berkshire,* 73 F.2d 745, 746 (9th Cir.). Inherent in the question of relationship is the matter of identity. Who is the person who claims to be the son of a citizen father? The assertion by a United States citizen of the Chinese race, upon return from a visit to China, that he had married a Chinese woman and that a son was born in China establishes the basis for a Chinese person at a later date to claim to be that son. Whether or not such a birth occurred is not subject to disproof—only proof can be required. Whether or not the person who makes the claim is that son is likewise only subject to the presentation of adequate proof.

The cases of *Acheson v. Yee King Gee,* 184 F.2d 382; *Wong Gan Chee v. Acheson,* 95 F. Supp. 815; and *Toy Teung Kwong v. Acheson,* 97 F.Supp. 745 (erroneously cited as 95 F. Supp.), are cited at page 7 of appellant's brief as authority for his statement that:

> "The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality."

In each of these three cases the *relationship* of the plaintiffs to the putative father *was conceded* and the sole question before the Court was whether the father had sufficient residence in the United States to comply with the statute and to thus confer citizenship on their children. The claim to citizenship referred to by the Court in each of the three cases was that of the fathers, and not the claim of the alleged children. From page 7 of appellant's brief the following is quoted:

> "The Court below in giving judgment against this appellant filed no opinion, but set forth in its memorandum order for judgment (T. 21) that the evidence presented by the appellant did not conform to the standards enunciated in the opinion filed the same day by the same Judge in the case of *Ly Shew v. Acheson,* 110 Fed. Supp. 50.
>
> "We submit that the principles laid down by the lower Court in the *Ly Shew* decision, supra, are contradictory to the normal degree of proof required in proceedings of this nature. It is a generally recognized rule of law that in civil cases the party having the burden of proof must establish the ultimate facts by a preponderance of the evidence."

Referring again to the contention of appellants in *Fong Wone Jing* and *Ly Shew* in conjunction with the above quoted contention, it should be clear to this Court that the proposition sought to be sustained by all counsel in these cases is: *The assertion under oath in the District Court by the claimant and the*

alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim. In immigration proceedings this contention has been extremely successful. The small number of cases that have been brought to the Court by way of habeas corpus well testifies to this success. The record in none of these cases, however, discloses the number of claimants who have been admitted to the United States as nationals upon proof, or rather absence of proof, that would arouse a true citizen to alarm. Many of the judges have become aware of the aura of fraud that surrounds these claims.

(1) Judge Hanford in *Gee Fook Sing v. U. S.*, 49 F. 146.

(2) Judge Hawley in *Lee Sing Far v. U. S.*, 94 F. 834.

(3) Justice Holmes in *U. S. v. Sing Tuck,* 194 U.S. 161.

(4) Justice Field in *The Chinese Exclusion Case,* 130 U.S. 581.

(5) Judge Bourquin in *Ex parte Jew You On,* 16 F.2d 153.

(6) Judge Rudkin in *Lee Sai Wing v. U. S.,* 29 F. 2d 108;

(7) Judge Lemmon in *Fong Ging Hung v. Acheson* (unreported), Civil Docket No. 6599.

(8) Judge Goodman in *Ly Shew v. Acheson,* supra.

(9) Judge Westover in *Mar Gong v. McGranery,* 109 F. Supp. 821.

The extraordinary position of the Secretary of State as defendant in the 903 action because a consul in Hong Kong had no conceivable basis upon which to identify thousands of Chinese who claimed to be citizens has been explored in *Fong Wone Jing* and *Ly Shew.*

What is the position of a Board of Special Inquiry? Certainly we cannot disagree with Judge Goodman that "We do not pass it (American citizenship) out on a platter."

In *Go Lun v. Nagle,* 22 F.2d 246; *Gung You v. Nagle,* 34 F.2d 848; and *Quan Toon Jung v. Bonham,* 119 F.2d 915, and any number of other cases this Court reviewed the proceedings of the Immigration Service on an appeal from a denial of the application for the writ of habeas corpus in the District Court. These cases are in Group 7 as distinguished on page 18 of the *Fong Wone Jing* brief.

> "(7) Persons who for the first time were seeking entry into the United States as citizens through derivation and who were denied admission to the United States by the Immigration Service."

Quon Quon Poy v. Johnson, supra, is the controlling Supreme Court decision.

In each of these cases a Chinese, fresh from China, who had spent all of his life in China, who had never been in the United States, says I am a citizen of the United States because I am the son of Wing Doe who is a citizen. Considering the "inestimable heritage of citizenship" which Justice Fuller in *Chan Bak Kan v. U. S.,* 186 U.S. 193 says "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show it was ever possessed.", what proof must be produced to justify any official or judge to say this man is a national or citizen of the United States? By some undisclosed process the Immigration Service was led into the position of assuming the burden to disprove the claim, and to thereby embark on an extensive interrogation of the witnesses having as its purpose the production of discrepancies. That all of the persons appearing as witnesses were "well coached" was well known to Immigration. The interception of numerous "transcripts" of the testimony to be memorized by each witness had conclusively established this fact. The attitude of mind of the examiner was obviously influenced by this knowledge and his purpose was to disclose discrepancies by breaking through the "story".

The objective is to probe an area where there may have been no preparation. The process is obviously tortuous, prolonged and seemingly exceedingly irrelevant as to the testimony adduced. Our question is still what proof is to be produced by the claimant?

Judge Bourquin was very clear on the question in *Ex parte Jew You On,* 16 F.2d 153, 154 (1926), when he said:

> "It is argued that, if the bare oath of two or three Chinese or other persons is not accepted, Chinese American citizens procreated in China will be barred from this country of their father's nativity. The answer is the responsibility is not the immigration officers' nor the court's. Like any case, the burden is the proponent's to prove it. Perhaps not unfamiliar registry systems might be adopted. Otherwise, this country is helpless, the exclusion policy futile, and the Chinese admitted will be limited solely by the extent there is courage to take advantage of opportunity."

Judge Garrecht in *Mui Sam Hun v. U. S.,* 78 F.2d 612, 615, stated:

> "The rule is not, as appellant contends that the applicant need only make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board."

With the above in mind let us turn to Judge Healy's opinion in *Quan Toon Jung v. Bonham,* supra, p. 919:

"Aside from the single item of the 1924 landing certificate, the showing of paternity was persuasive. On the occasion of Quan Siew's various other landings and departures the information given by him concerning the appellant and his other children squares with the present testimony. There were slight discrepancies, of course, as in the phonetic spelling of names, but these were not significant, and are readily explainable. *The testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief.* On the great mass of intimate details testified to their accounts are confessedly in substantial agreement. There is no evidence of coaching, as the board of review concedes; and indeed coaching sufficient to produce the results obtained here would have been virtually impossible. Quan Siew and the boy had not seen each other in seven years and at the time of the inquiry they were separated by a distance of a thousand miles. If it were permissible to judge from their photographs it would be seen that the two so closely resemble each other as to further substantiate the belief that they are father and son." (Emphasis ours.)

The evidence submitted was in the familiar pattern —"I am the son"—"I am the father", followed by the belated attempt of the examiner by extensive interrogation to uncover a discrepancy.

Judge Bourquin's remarks at page 154 of *Ex parte Jew You On* are illuminating:

"In endeavor to avoid the usurpation (judicial invasion of executive domain), the immigration

> authorities have invented a more or less absurd rule of 'discrepancies'. That is by examination of immigrant and witnesses to develop contradictions, often collateral and trivial in character, and by reason of these to justify that which needs none—their disbelief of the immigrant's witnesses before them."

But to return to *Quan Toon Jung,* Judge Healy says the photograph of Leong Sing and Quon Siew are slender evidence of identity and that the Bureau at Washington was right in rejecting it. But says the judge, the examination of the photograph of Quon Siew and the boy affords further substantiation for the belief that they are father and son.

Judge Healy says there is substantial agreement on the great mass of intimate details testified to in their accounts.

Judge Roche in *Lee Mon Hong v. Brownell,* No. 13,957 in this Court has said "Had he (the plaintiff) been letter perfect in his answers to all the examiner's questions the Court might be more inclined to believe him an imposter reciting memorized material."

Judge Goodman in *Ly Shew v. Dulles,* supra, has specifically stated his trouble:

> "The testimony at the trial, which lasted three days, was entirely given in the Toy Shaw Chinese dialect and interpreted into English. Neither Ly Shew, the alleged father, nor the plaintiffs, nor the witnesses in behalf of plaintiff, could speak a word of English.

> "Many times the interpreter carried on extensive dialogues with the witness before obtaining a response to a question propounded. Inconsistencies and contradictions in testimony became manifest. To fairly determine their effect is difficult if not impossible. Familiar as we are in this court with Chinese interpreted testimony, it can be categorically stated that it is well-nigh impossible to determine the credibility of such witnesses, at least after ten years of constant trial work, I find it so."

Judge Healy, in *Quan Toon Jung,* had no difficulty in reading a cold record, with no interpreter problem, and in reaching the conclusion that "the testimony of the applicant and of the alleged father in support of the relationship is of such character as to compel belief." It appears to us that the case had a strong aroma of fraud. Immigration and the Court below had had no trouble detecting it.

The cases of

Ex parte Cheung Tung (D.C., Wash.), 292 F. 997, 1000;

Ex parte Delaney, 72 F. Supp. (erroneously cited as 77 F. Supp.) 312, 322, affirmed 9 Cir., 170 F.2d 239;

Lilienthal's Tobacco v. U. S., 97 U.S. 237, 24 L. Ed. 901, 905,

cited by appellant, do not support his "preponderance of the evidence" contention. Judge Dietrich in *Cheung Tung* is quoted by appellant (Tr. p. 7). This statement is ambiguous. Did the judge mean additional

conclusive evidence, or that the conclusive evidence should be more conclusive? We think the judge usurped the function of immigration and substituted his opinion in a manner contrary to *Quon Quon Poy v. Johnson.* The following quote from page 1000 is interesting:

> "But upon the essential features the witnesses, testifying separate and apart one from the other and without assistance or guidance of counsel, are substantially in harmony; *indeed, greater harmony would be suggestive of collusion*". (Emphasis ours.)

Perhaps we are approaching a rule of greater or lesser harmony.

Ex parte Delaney and *Lilienthal's Tabacco* are not in point.

Appellant, at page 13 of his brief, submits that he has made a *prima facie* case, that the burden of going forward consequently shifts to the defendant, that since defendant presented no evidence, it failed to carry its burden, and judgment should be for appellant.

This Court in *Wong Kam Chong v. United States,* 111 F.2d 707, 712, discussed the question of burden of proof and stated:

> "Burden of proof in one sense means the duty to establish a certain fact by a certain degree of proof, such as a preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt. In another sense it means the

> duty to offer evidence or the duty to go forward with the evidence."

Where, as here, the evidence is solely within the possession of appellant, the reasoning of counsel for appellant begs the question as to the duty of going forward and what constitutes a *prima facie* case in this sort of proceeding. Whether or not the showing made is *prima facie* depends upon the nature and extent of the burden of proof.

The Courts of the United States have recognized the great difficulty confronting them as well as the Immigration Service in cases involving claims to United States citizenship.

In *Chan Bak Kan v. United States,* 186 U.S. 193 (1902) the Supreme Court stated:

> "The facts on which such a claim (assertion of citizenship) is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves under pressure of a particular exigency, without being able to show that it was ever possessed." (Words in parenthesis ours.)

This Court in *Lee Sing Far v. United States,* 94 Fed. 834 (C.A. 9) recognizing the problem stated at page 837:

> "It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would as a general rule be impossible to do so."

Reference is made to the *Fong Wone Jing* brief, pages 38 to 62.

In *Ex parte Lung Wing Wun,* 161 Fed. 211, 212, 213, decided in 1908, the Court stated:

> "There is a natural presumption that a person of the Mongolian race coming to this country from China, is an alien; and to overcome that presumption, and secure recognition of the rights, privileges, and immunities pertaining to citizenship, *convincing evidence is essential* * * *."

The 2nd Circuit expressed this view in *Lee Sim v. United States,* 218 Fed. 432 at page 435:

> "In these deportation proceedings there is a natural presumption that a person of the Mongolian race is an alien and it is essential that the evidence to overcome it and to show that the man is entitled to the privileges of citizenship in the United States should be *clear and convincing.*" (Emphasis ours.)

See also:

Ex parte Chin Him, et al., 227 Fed. 131, 133.

Of the four cases cited above, the first two involved exclusion of persons claiming United States citizenship and the other two involved deportation of persons claiming United States citizenship.

Judge Garrecht, speaking for this Court in *Mui Sam Hun v. U. S.,* 78 F.2d 612, in an opinion subscribed to by Judges Wilbur and Denman without dissent, at page 615 said:

> "The rule is not, as appellant contends, that the applicant need only make out his case by a fair

> preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary and capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board."

Mui Sam Hun was a claimant to native birth.

Judge Goodman in the *Ly Shew* case recognized the rule that proof of alleged citizenship must be clear and convincing and at page 58 stated:

> "Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty.[15] This high standard may be required to sustain claims which have serious social consequences or harsh or far-reaching effects on individuals.[16] To justify an exceptional

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[15]IX Wigmore on Evidence § 2498 at page 329 (3d Ed. 1940); 32 C.J.S. Evidence, § 1023 (1942); 20 American Jurisprudence, Evidence, §§ 1252-1253 (1939).

[16]E.g. note, 128 A.L.R. 713 (1940) (degree of proof to establish the illegitimacy of children born in wedlock); Note, 13 Minnesota Law Review 580 (1929) (proof of adultery in divorce actions); Note, 12 A.L.R. 2d 153 (1950) (showing necessary for rescission of divorce decree after remarriage); Commissioner of Public Welfare v. Ryan, 1933, 238 App. Div. 607, 265 N.Y.S. 286 (proof in filiation proceeding); Johnson v. Feskens, 1934, 146 Or. 657, 31 P. 2d 667, 107 A.L.R. 340 (proof to justify forfeiture under a contract); Dickson v. St. Louis & K. R. Co., 1902, 168 Mo. 90, 67 S.W. 642 (to divest title to real estate for breach of a condition subsequent).

judicial remedy[17] or to circumvent established legal safeguards,[18] the proof must usually meet this standard. Instruments which have established legal rights and warrant great reliance may not be contradicted except by this degree of proof.[19] As well, this standard is employed in cases where the opportunity for fraud and the temptation to perjury is great. Thus, this standard must be met to sustain certain claims which are easily fabricated and difficult to disprove, or which are evidenced merely by the oral testimony of interested witnesses as to events long past.[20]"

Judge Dal M. Lemmon, in *Fong Ging Hun v. Acheson,* Civil No. 6599, and *Fong Shew Sen v.*

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[17]E.g. 49 American Jurisprudence, Specific Performance, § 169 (1943) (proof of the existence of a contract when specific performance is demanded).

[18]E.g. 1 American Jurisprudence, Acknowledgement, § 155 (1936) (to impeach an acknowledgement).

[19]36 Am. Jur., Mortgages, §§ 134-135 (1941); Note, L.R.A. 1916B, 192 (to show an absolute deed is a mortgage); 9 Am. Jur., Cancellation of Instruments, § 63 (1937); 45 Am. Jur., Reformation of Instruments, §§ 116-117 (1943); Note, 94 A.L.R. 1278 (1935); Note, 48 A.L.R. 1462 (1927); 117 A.L.R. 1022 (1938) (to justify reformation or rescission of a written instrument for fraud, mistake, or undue influence).

[20]E.g. 57 Am. Jur., Wills, §§ 981-983 (1948) (to prove a lost will); 57 Am. Jur., Wills § 728 (1948); Note, 69 A.L.R. 167 (1930) (to prove agreement to leave property to another); Note, 7 A.L.R. 2d 25 (1949) (proof of agreement for compensation for services rendered to a relative); 24 Am. Jur., Gifts, § 133 (1933) (to prove a parol gift after the death of the donor); 54 Am. Jur., Trusts, §§ 620-624 (1945); 23 A.L.R. 1500 (1923) (oral proof of an express trust in realty or personalty, or of facts giving rise to a resulting or constructive trust); Furman v. St. Louis Union Trust Co., 1936, 338 Mo. 884, 92 S.W. 2d 726 (proof of agreement to adopt as basis for sustaining right to inheritance); The Barbed Wire Patent (Washburn & Moen Mfg. Co. v. Beat 'Em All Barb-Wire Co.), 1892, 143 U.S. 275 at page 284, 12 S.Ct. 443, 36 L. Ed. 154 (to prove prior anticipatory use of an invention); Commissioner of Public Welfare v. Ryan, 1933, 238 App. Div. 607, 265 N.Y.S. 286 (proof in filiation proceedings).

Acheson, Civil No. 6629 (December 10, 1952, unreported), recognized the rule and stated:

> "Courts should act with much care and circumspection in this type of case (complaints filed under Sec. 903). Experience has proven that many frauds have been resorted to in order that Chinese nationals might gain admission to this country. Consequently certain rules have been developed which are singularly applicable to cases of this kind. The presumption is that a person of the Chinese race coming to this country from China is an alien and the burden of overcoming this presumption is *not* met by a *mere preponderance* of evidence. *The evidence must be 'clear and convincing.'* In determining whether that test is met the court may and should consider the interest of the witnesses since the witnesses are usually 'interested'." (Parentheses and emphasis ours.)

So far we have been concerned with habeas corpus after completion of immigration procedure. The case herein is filed under 8 U.S.C. 903 as an entirely new proceeding, although there had been a Board of Special Inquiry hearing and an appeal to the Board of Immigration Appeals. The asserted authority is *Mah Ying Og v. Clark,* 81 F. Supp. 696, 187 F.2d 199, *Gan Seow Tung v. Clark,* 83 F. Supp. 482. Reference is here made to the *Fong Wone Jing* brief, pp. 28-38, and the discussion of these cases therein.

The contention is that the trial is *de novo* and that the record of the immigration proceedings is not admissible in evidence except possibly for impeachment

purposes. (Tr. pp. 117-118, 150, 151.) That there is confusion is demonstrated by the decision of this Court in *Wong Wing Foo v. McGrath,* 196 F.2d 120. Judge Denman, in the original opinion filed February 14, 1952, after first reciting that the appeal was from a judgment in a suit for declaratory judgment in which the Court had held appellant to be an alien, and that a Board of Special Inquiry had previously found that appellant was not the son of Wong Yem, the alleged father, which finding had been affirmed by the Board of Immigration Appeals, concluded:

> "The district court properly held that the issue in the suit before it required a trial de novo."

The decision then held that the testimony of a witness, Wong Gong, produced by the appellant at the Board of Special Inquiry hearing but not produced at the trial "was not before the Court merely because it was taken in the proceeding before the board of special inquiry."

> "It is apparent from the entire record of this case and from the use made by the district court of the copy of Wong Gong's testimony that the plaintiff was seriously prejudiced thereby."

The judgment was reversed and remanded. A petition for a rehearing was filed and the Court's attention was called to meaning of "trial de novo", that it is a hearing upon the record plus such additional evidence as the appellant may present. Judge Denman thereafter filed an amended opinion on April 28, 1952 which recites that plaintiff-appellant,

"upon presenting a *passport* from the American Consul General at Hong Kong was denied his claimed right as an American citizen to enter at once and was held in detention by the immigration authorities. Instead of filing at once the instant suit under § 903 he waited until after immigration authorities had determined in a proceeding under 8 U.S.C. § 503 before a board of special inquiry that he was not the son of Wong Yen." (Emphasis ours.)

And further:

"We can find nothing in the language of § 903 warranting treating the action there provided as anything other than an *independent action* which plaintiff could have brought as soon as the immigration officials refused to accept his passport and to allow him to enter." (Emphasis ours.)

Was this a confession and avoidance? The issue presented was avoided by holding that the proceeding under § 903 was an "independent action" because of the "passport."

But a passport is not evidence of citizenship.

Urtetiqui v. D'Arcy, 34 U.S. 692;
Edsell v. Mark (9th Cir.), 179 F. 292;
Miller v. Senjin, 289 F. 388;
Hackworth's Digest of International Law, Vol. 3, pp. 435-36;
Fong Wone Jing brief, pp. 8-18.

The practice commented upon by Judge Hawley in *Lee Sing Far v. U. S.,* 94 F. 834 (9th Cir. 1899), is particularly pertinent at this point. The judge com-

mented on a not uncommon practice in Chinese cases for counsel not to take any exception to the report of the referee, then after entry of the judgment by the District Court, to substitute attorneys, who then come into Court claiming inadvertence, oversight and neglect and ask for a rehearing which is granted enabling the applicant to supply the "missing link" in the evidence. The judge said "such procedure * * * does not commend itself to our favor."

According to *Wong Wing Foo* such procedure is not only commended but has judicial benediction.

On August 27, 1953 Judge Denman filed an opinion in *Florentine v. Landon,* 206 F.2d 870. In it he says:

> "There is no merit to Florentine's claim that the fact that he is claiming United States citizenship gives him a right to institute this habeas corpus proceeding without regard to the status of the administrative proceeding. * * *"
>
> "No special circumstances exist why the orderly way provided by Congress to raise the fundamental question of citizenship through the administrative proceeding should not be pursued. * * * Even where a person claiming citizenship is permitted to bring an action for declaratory relief in order to determine citizenship, the administrative remedies must first be exhausted."

See also:

Ng Yip Yee v. Barber, No. 14096 in this Court, decided Dec. 24, 1953.

THE EVIDENCE.

After discussing on pages 8-12 the evidence presented at the trial, appellant at page 14 of his brief states:

> "The appellant introduced for the Court's consideration the best available evidence. This evidence presented was stronger than that necessary to establish a prima facie showing of the claimed relationship, and unless this affirmative showing is rebutted it is sufficient to warrant judgment in appellant's favor.
>
> "When no contradictory evidence is offered, unsupported allegations are not sufficient to overcome the prima facie showing."

And cites:

> *Wong Kam Chong v. United States,* 111 F.2d 707;
>
> *Leong Kwai Yin v. United States,* 9 Cir., 31 F. 738;
>
> *Fong Lum Kwai v. United States,* 9 Cir., 49 F.2d 19;
>
> *Lee Choy v. United States,* 9 Cir., 49 F.2d 24.

Each of the aforesaid cases involved deportation (expulsion) of one who had *previously* been admitted to the United States as a native born citizen and to whom Immigration had issued a certificate of identity. This circuit has long held that a certificate of identity is *prima facie* evidence of the right of the holder to be and remain in the United States, and it was in this connection that this circuit in each of the four cases

cited by appellant held that unsupported allegations are not sufficient to overcome the *prima facie* showing. Such statement has no application to the case at bar and the cases are cited entirely out of context with the instant proceeding.

At the trial in the Court below, appellant testified to his relationship to his purported father, Chow Yit Quong, and presented as witnesses Chow Yit Quong; Chow Sam, a purported brother; and So Tak, a friend. In addition he submitted in evidence two photographs, income tax statements for the years 1942-1945, and a certified copy of Selective Service questionnaire.

Administrative hearings were afforded appellant during the course of which he and his alleged father were interrogated. The transcripts of their testimony were admitted in evidence as Defendant's Exhibits A and C "to the extent that they are impeaching" (Tr. p. 150). A number of "discrepancies" were developed in said testimony. They are set forth in the "Interrogatories to adverse party" and the "answers to interrogatories" which were also admitted into evidence (Tr. p. 116).

The direct testimony of appellant and his alleged father carefully avoided the said "discrepancies"—at least they are not there. The effect of the administrative hearings was to permit a "trial run" on the claim and to afford opportunity to supply the "missing link" to quote Judge Hawley in *Lee Sing Far v. U. S.*, supra.

Some of the inconsistencies are as follows:

1. *At the trial appellant* testified that he saw his father's second wife for the *first time* in the *home village of Kwangtung Po* (Tr. p. 115).

1(a) Appellant admits that at Immigration he stated that he met his father's second wife for the first time in Canton City on the day of the marriage (Tr. p. 9, Interrog. No. 4).

2. In the Court below appellant stated he was *not present* at his father's wedding feast in Canton City (Tr. p. 115),

2(a) but admits that at Immigration his testimony was that he *did attend* the wedding feast at Canton City and described the restaurant in which the feast took place and who attended (Tr. p. 9, Interrog. No. 4).

3. Appellant testified before the Court that he had resided in Kwangtung Po village for two weeks in 1947 and also when he was very small (Tr. p. 116).

3(a) He admitted making the statements on page 3 of the hearing record (Tr. p. 10) but stated he didn't make the statements on page 6 of the hearing (Tr. p. 11) which reflects that appellant stated he had *never* been in Kwangtung Po village.

4. At pages 126, 127 of the transcript appellant testified that his father had one brother, Chow Sing Quong, who had some children but didn't know how many. He named two and stated he slept in the same house with them.

4(a) Appellant admits that before Immigration he testified that he *never saw* any of his uncle's

children and did not know any of their names (Tr. pp. 13 and 14, Interrog. No. 10).

5. Appellant testified his mother died in *Kwangtung Po village* in 1913 (Tr. pp. 127, 128),

5(a) Admits telling Immigration that his mother died in the city of Macao (Tr. pp. 14 and 15, Interrog. No. 11).

The above are only a few of the inconsistencies between appellant's testimony before the Court below as compared to that before Immigration.

The alleged father, Chow Yit Quong, claimed to have come from China to the United States in 1923. After 20 years he could not speak or understand the English language sufficiently to do without an interpreter. He was unable to state the birth dates of any of the other six children he claimed to have fathered with his first wife. Exhibit No. 2 is a photograph of two small children whom the witness identified as the likeness of appellant and a deceased daughter, Chow Suey (Tr. pp. 49-50). He stated the photograph was taken in 1938 after he had returned to the United States and that it had been sent to him. However, at page 39 of the transcript he testified that he had not returned to the United States until March 11, 1939. In this connection, although the witness claimed to have had the photograph, Exhibit No. 2, in his possession on his last return to the United States in 1950 (Tr. p. 50) he did not present the photograph or any of the other exhibits to Immigration (Tr. p. 80).

The alleged brother, Chow Sam, came to the United States in 1940 and could not have seen appellant until 1950. The witness, So Tak, saw appellant for the first time in 1947. Chow Sam testified (Tr. p. 137) that he had lived with appellant 6 or 7 years and in response to the question "How old is he?" (appellant) the answer was "He is 18", although he didn't remember the date or year of appellant's birth.

This Court in *Sue v. Nagle,* 295 F. 676 (1924) has said:

> "In cases of this character (Sec. 1993 derivative citizenship) experience has demonstrated that the testimony of the parties in interest as to the mere fact of relationship cannot be safely accepted or relied upon." (Words in parenthesis ours.)

And in *Lee Choy v. U. S.,* 49 F.2d 24, 27 (9th Cir. 1931):

> "It is also contended that the testimony or declarations of said Lau Tin Ko and Lau Tin Hoo, who claim to be and were admitted as sons of said Lau Moon and Ching Shee, and who were shown to be somewhere on the mainland of the United States, come under the exceptions to the hearsay rule also. The answer to the latter contention is that these witnesses at the time of giving their testimony were shown to have been vitally interested in proving that they themselves, and not the appellant, were sons of Lau Moon and Ching Shee, and hence are shown not to be qualified to make their declarations admissible under the necessity principle.

'The declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest.' Sugden v. St. Leonards, L.R. 1 P.D. 154; cited in Wigmore on Evidence, volume III, § 1420.

'In order to adhere as closely as possible to the policy of shutting out all vague, second-hand, and unauthenticated evidence, such exception is made in favor of proofs of declarations and reputation (of family history) only where the persons whose opinion and declarations are relied upon, besides being those most likely to be well informed as to the facts, were also, so far as appears, free from all possible inducement to misrepresent the truth themselves or from any danger of being misled by others so interested. * * * It is then received * * * because ordinarily, they could have no temptation to falsehood or misrepresentation on such subject.' People v. Fire Ins. Co., 25 Wend. (N. Y.) 220; cited in Wigmore, supra, § 1482.

'In cases of pedigree, (hearsay) is admitted, upon the ground of necessity, or the great difficulty, and sometimes, the impossibility, of proving remote facts of this sort by living witnesses, * * * there being no lis mota or other interest to affected the credit of their statement.' Ellicott v. Pearl, 10 Pet. 434, 9 L. Ed. 475, Story, J.; Wigmore, supra, § 1481."

See also:

Lau Hu Yuen v. U. S., 85 F.2d 327 (C.A. 9-1936).

The Court may find of interest certain observations made by counsel for appellant which are found at pages 178 and 179 of the transcript. At page 178, Mr. Hertogs stated:

> "* * * And what has caused some of this in the past is the fact that it is very bad for a Chinese not to have a son. Ordinarily that is where we are confronted with a number of problems in these cases. Chinese custom requires them to have a son. If they don't have a son, they get a son."
>
> "The Court. Some how."
>
> "Mr. Hertogs. They get a son one way or the other, and he is put in the family and he takes his position in the family as if he were a legitimate son, because that is one of the most important things in their way of life."

CONCLUSION.

Appellee has hereinabove set forth the proposition which appellants seek to sustain in this case and which counsel seek to make applicable to all derivative 903 cases. *The assertion under oath in the District Court by the claimant and the alleged parent that they are parent and child establishes a preponderance of the evidence sufficient to sustain the burden of proof and the defense must move forward to disprove the claim.*

The evidence herein amounts to nothing more than such an assertion by the claimant and the alleged father.

At page 22 of his brief appellant states:

> "The evidence produced by the appellant was sufficient to establish the existence of the relationship under 'reasonable judicial standards'. (*Chin Hong Yuk v. U. S.* (C.A. 9) 23 F.2d 174.) American citizenship is a most precious right. Its denial should not be allowed to rest upon a doubtful premise. *Machado v. McGrath,* 193 F.2d 706, Cert. den. 72 S. Ct. 557."

The two cases cited in the above statement are not in point. Chin Hong Yuk was a Chinese who claimed *to be a native born* citizen of the United States. *He had been admitted to the United States by Immigration in 1922. Fifteen years* later he was arrested by Immigration and held for *deportation.* This Court found no reason to reject the testimony given by him in 1922 and held that while Section 3 of the Act of May 5, 1892, 8 U.S.C. 284, required that citizenship of a Chinese person must be proved to the satisfaction of the judge or commissioner, such proof "means nothing more than that the proof must be sufficient to satisfy reasonable judicial requirements."

The *Machado* case involved an alien who had applied for relief from deportation in the form of an application for suspension of deportation. His application had been denied on the ground that having applied for exemption from military service, he was not eligible to become a citizen—a requisite to suspension. Machado was able to prove he did not know what he was doing when he applied for relief from military service and

that he had later volunteered to enter the United States Army. It was in this context that the Court said

> "* * * that American citizenship, being a most precious right, its denial should not be allowed to rest upon a doubtful premise."

To this appellee adds Judge Goodman's comment in *Ly Shew*—"We do not pass it out on a platter."

Reference is again made to the briefs in *Fong Wone Jing* and *Ly Shew*. They are incorporated and made a part hereof in their entirety. Any further attempt to distinguish, explain, criticize, comment upon or otherwise consider any of the cases cited by appellants or appellees is repetitive to say the least.

Dated, San Francisco, California,
January 4, 1954.

Respectfully submitted,

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(Appendix A Follows.)

Appendix A

Appendix A

Filed Oct. 5, 1953

District Court of the United States
Southern District of California
Central Division

Wong Wing Sloo, Plaintiff, vs. John Foster Dulles, as Secretary of State, Defendant.	No. 14,742-HW
Wong Fay Poo, by and through his next friend, Hong Sick Koon, Plaintiff, vs. John Foster Dulles, as Secretary of State, Defendant.	No. 14,761-HW
Wong Doon Loy, Plaintiff, vs. John Foster Dulles, as Secretary of State, Defendant.	No. 14,864-HW
Chin Kwong Hing, Plaintiff, vs. John Foster Dulles, as Secretary of State, Defendant.	No. 14,980-HW

MEMORANDUM

Plaintiffs in each of the above-entitled actions filed petitions for declaratory judgment under Section 503 of the Nationality Act of 1940. Subsequent to their filing, the government made motions to dismiss the actions on the grounds of (1) lack of jurisdiction of the subject matter of the defendant and (2) failure to state a claim upon which relief can be granted.

As authority for dismissal, the government cited *Lee Hung v. Acheson, Lee Siu v. Acheson* and *Lee Jam v. Acheson,* 103 F. Supp. 35, in which a similar motion had been made in the United States District Court of Nevada. The Court said, at page 38:

> "As a jurisdictional prerequisite, it must appear from a complaint under 8 U.S.C.A. #903 that a plaintiff who claimed a right or privilege as a national of the United States was denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States.
>
> ". . .
>
> "Each of the complaints of the said plaintiffs should be dismissed for the reason that in none of said complaints is there a compliance with Rule 8(a) (1), Federal Rules of Civil Procedure, there being no allegation in any of said complaints that the plaintiff therein claimed and was denied a right or privilege as a national of the United States upon the ground that he is not a national of the United States."

Feeling that the rights of the plaintiffs in the cases at bar should not be disposed of on a technical motion,

the Court, on June 22, 1953, set down all four cases for pre-trial hearing upon the sole issue of jurisdiction of this Court to hear the petitions and instructed counsel to present at the pre-trial hearing any evidence they might have relative to the jurisdictional question.

At the pre-trial hearing on September 21, 1953, plaintiffs appeared by counsel and represented that they did not have any testimony to offer on the question of jurisdiction but insisted the allegations of the complaints themselves were sufficient to clothe this Court with jurisdiction. When plaintiffs' counsel announced they had no evidence in behalf of plaintiffs, or any or either of them, the Court then asked the United States attorney for evidence relative to denial of the passports or certificates of identity.

The United States Attorney presented to the Court the certified passport file in each of the instant cases. The government requested that the files be marked for identification, which was done, and subsequently requested their admission into evidence. Plaintiffs objected to admission of the files in evidence, and the question of whether they should be admitted was taken under submission by the Court.

Plaintiffs find themselves in a dilemma. They had no evidence to present at the pre-trial hearing. They objected to the only available evidence—the passport files. It seems that since plaintiffs themselves have not established the Court's jurisdiction, the four cases could be summarily dismissed. This is a Court of limited jurisdiction, and to maintain an action herein

it is necessary that plaintiffs first establish that the Court has jurisdiction to hear it. Deeming it necessary to have all available information concerning plaintiffs' rights to be heard, the Court has decided to admit the official passport records into evidence, not for the purpose of considering any testimony or reviewing the effect thereof but only for the limited purpose of ascertaining whether plaintiffs, or any or either of them, have been denied any right or privilege as nationals of the United States on the ground that they were not such nationals.

In an earlier case Fong Nai Sun, by Fong Kwok Wah, his next friend, vs. John Foster Dulles, as Secretary of State, #13,417, in which this Court filed a Memorandum, we said:

> "There is, however, a more important matter presented to the court. It relates to the question of jurisdiction. Section 908, Title 8, U.S.C.A., provides:
>
> " 'If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States.' For this Court to have jurisdiction under

the above statute it must appear that plaintiff herein has been denied a right or privilege enjoyed by a national of the United States.

" 'It is settled that, when a person attempts to enter this country through the official immigration channels, and claims the right to enter on the ground that he is an American citizen, he is not entitled to have his claim determined in a judicial proceeding. . .

United States v. Brough, 16 F2d 492. (Affirmed: 20 F.2d 1023; Certiorari denied, 275 U.S. 599).'

"However, Congress has determined that if the applicant has been denied a right or privilege on the ground he was not a national of the United States, the Federal Court would have jurisdiction to hear and determine the matter. But if the Federal Court is to have jurisdiction, it must appear the rights or privileges denied were refused upon the sole ground that the applicant was not a national of the United States.

". . .

"Citizens do not have an absolute right to demand and receive a passport. One may be a citizen of this country and yet, for various reasons, may be denied the right to travel. . . ."

To dispose of the rights of the plaintiffs herein and to determine whether denial of a right of passport was upon the ground that applicant was not a national of the United States, the Court deems it important to look at the official passport files.

WONG DOON LOY

It appears that on August 11, 1952, the American Consul at Hong Kong addressed a letter to Jackson & Hertogs, 580 Washington Street, San Francisco 11, California, who are attorneys representing plaintiff in the case at bar, in which it is stated that the evidence in support of the Wong Doon Loy application for passport consists solely of four affidavits made by non-members of the Wong family. The letter pointed out that the requirements of family members as witnesses could not properly be waived. The passport file indicates this letter was never answered. On April 7, 1953, a similar letter was addressed to the alleged father of Wong Doon Loy, and a request was made for a blood report of the father. The file indicates that none of these letters were answered.

It appears from the record that the Consulate General has not completed processing this application, and the State Department has not made a final determination of applicant's claim to citizenship. It is evident that this plaintiff has not exhausted his administrative remedies.

As pointed out in the *Fong Nai Sun* case, supra, citizens do not have an absolute right to demand and receive passports. One may be a citizen of this country and yet for various reasons may be denied the right to travel, for he may be unable to satisfy the family-background-information requirement of the passport application. Also, under the form presented, the applicant must produce someone who can testify

that he is a citizen of the United States. Plaintiff Wong Doon Loy in the case at bar has failed to establish his right to passport privileges under these particular requirements.

The question presented to the Court in this case is whether, prior to adjudication by the Department of State that plaintiff is not a citizen of the United States, he may appeal to the Federal Court for determination of this question. The only right of appeal to the Federal Court is upon the ground that he had been denied a right or privilege as a national of the United States upon the ground that he is not such national. There is no evidence in the record to indicate plaintiff has been denied any such right or privilege. The record shows he is being treated in exactly the same manner as each and every applicant for passport is treated. There is nothing before the Court to indicate in any way that this Court has any jurisdiction of his alleged cause of action.

Chin Kwong Hing

In the *Chin Kwong Hing* case the official passport record indicates Chin Kwong Soon and Chin Kwong Hing appeared at the office of the American Consulate General in Hong Kong, claiming to be the first and second sons of an American citizen father, Chin Quocey (Fee). Applicants were blood-typed at Hong Kong, China, and the alleged parents were blood-typed through Immigration and Naturalization Service in Los Angeles, California, with the following results:

	Name	*Group*	*M-N*
Father:	Chin Quocey (Fee)	A	M
Mother:	Mah Suey Jin	O	MN
Son:	Chin Kwong Soon	B	MN
Son:	Chin Kwong Hing	A	MN

The results of the blood-type tests proved conclusively that Chin Kwong Soon cannot be the offspring of the two persons whom he and Chin Kwong Hing allege to be their parents.

The official passport file indicates that on November 4, 1952, these applicants were informed that at least one of them must be an imposter, and the applications were denied. In this case the denial of a passport is not upon the ground that applicants were not nationals of the United States. Denial is solely and only upon the ground that the claim of parentage is fraudulent. Hence the Court must conclude it does not have jurisdiction.

Wong Fay Poo

The American Consulate General in Hong Kong requested that the paternal grandfather and grandmother of Wong Fay Poo be produced as witnesses for plaintiff. Applicant's father represented to the Counsel's office that inasmuch as the grandparents were over seventy years of age and lived in a village some distance from Hong Kong it would not be feasible for them to appear as witnesses for applicant. The father of applicant (Wong Sick Koon) also refused, on behalf of himself and his wife, to be blood-typed with their alleged son to establish a possible relationship.

A review of the passport file indicates the application of Wong Fay Poo was disapproved on the ground of insufficient evidence to establish the identity and relationship alleged. Again we have denial of a passport, not upon the ground that applicant was not deemed to be a national of the United States, but upon the ground that he had failed to establish or verify the facts in his application for passport.

So, again, the Court is forced to the conclusion that this is not denial upon ground applicant is not a national of the United States.

Wong Wing Sloo

Wong Wing Sloo was denied a passport because of his inability to produce documents or evidence satisfactorily establishing his claim of identity and relationship to the persons claimed as his relatives and because of discrepancies in the testimony given by him at the time of application and by his alleged mother and brother. The file indicates he was denied passport facilities because of failure to establish the identity alleged.

Testimony in cases such as these is always unsatisfactory because of discrepancies in statements made by the various witnesses. If the Court was reviewing testimony in an attempt to determine whether the discrepancies were of sufficient moment to justify a conclusion that plaintiff was not the son of a citizen, it would be confronted with an entirely different problem from that presented in the proceedings at bar. Here the only question presented is jurisdiction. If

this Court has jurisdiction, it must be upon the sole ground that plaintiffs have been denied a right or privilege as nationals of the United States upon the ground that individually they are not such nationals. A refusal to grant a passport upon the ground of unsatisfactory or contradictory evidence, or failure of an applicant to establish his identity is not a denial of his claim of citizenship. Every citizen, whether here or abroad, when making application for a passport must establish to the satisfaction of the State Department, in accordance with the forms provided and approved for that purpose, that he is entitled to the passport, and until he fulfills the prescribed requirements he may not have the passport privilege.

The Court in this instance must hold, as in the foregoing three, that denial of a passport was not upon the ground that Wong Wing Sloo is not a citizen of the United States.

Inasmuch as plaintiffs have been unable to establish that this Court has jurisdiction, and as the official files of the State Department indicate the denials were not such as to give this Court jurisdiction, it is necessary to grant the defendant's motion to dismiss the petitions.

Motion for dismissal granted.

Dated: October 1, 1953.

HARRY C. WESTOVER,
District Judge.